TABLE OF CONTENTS

Page

Opinions Below. 2

Jurisdiction. 2

Questions Presented. . . . . .2, 3, & 4

Statutes, Federal Rules, and Regulations. . . . . .4 & 5

Statement Involved. . . . . .5 to 13

Reasons For Granting The Writ. 13

Conclusion. 17

Appendix

TABLE OF CITATIONS

Cases

Ben W. Hand Farm, Inc. v. Georgia Power Co., 222 Ga. 830 152 S. E. (2d) 841. 6

County of Allegheny v. Frank Mashuda Co., 360 U.S. 185, 3 L. Ed. (2d) 1163, 79 Sup. Ct. 1060. 14

Lynch v. Household Finance Corp., 405 U.S. 538, 31 L. Ed. 424, 92 Sup. Ct. 1113. 15

Mitchum v. Foster 407, U.S. 225, 32 L. Ed. (2d) 705, 92 Sup. Ct. 2151. 15

Automotive Sales Corp. v. Stayton, 45 Federal (2d) 476. 16

New Amsterdam Casualty Co. v. Russell, 103 Ga. App. 553, 120 S.E. (2d) 150. 17

Statutes

Title 28 U.S.C. 1254(1). 4
Title 28 U.S.C. 1331. 4
Title 28 U.S.C. 1334(3). 4, 15
Title 28 U.S.C. 1334(4). 5
Title 42 U.S.C. 1983. . . . . .5, 16
Georgia Code 36-801. 5
Georgia Code Chapter 36-6A. 11

IN THE

SUPREME COURT OF THE UNITED STATES

_____, Term 1974

No. . . . . .

S. K. BROWN,

Petitioner,

v.

GEORGIA POWER COMPANY, et. als,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

Petitioner, S. K. Brown, prays that a Writ of Certiorari issue to review the Judgment

of the United State Court of Appeals for the Fifth Circuit entered in the above case on the 14th day of March, 1974.

OPINION BELOW

The Opinion of the United States District Court for the Southern District of Georgia (Appellant's App. 1-- is reported in_____F. Supp._____. The opinion of the Court of Appeals for the Fifth Circuit (Appellant's App. _____) is reported in_____F. (2d)_____.

JURISDICTION

The Judgment of the Court of Appeals for the Fifth Circuit and the Judgment of the United States District Court for the Southern District of Georgia are attached hereto Appendix at pp. 1-2 and 3-22. The Jurisdiction of this Court is invoked under 28 U.S.C. 1254(1), 1343(3), (4) e Tit. 42 U.S.C. 1983.

QUESTIONS PRESENTED

1. Can Respondent and the Superior Court of Burke County, Georgia prevent the consideration of Rights guaranteed to the Peti-

tioner by the Constitution and Laws of the United States by subverting the Laws of Georgia as follows:

(a) Signing a Condemnation Judgment, without notice to Petitioner, on the same day the Special Master filed his report when the law of Georgia granted Peti tioner TEN (10) DAYS to file exceptions to the Special Masters Report (Appendix pp. 75 - 80).

AND

(b) Without Notice or Hearing striking and exponging from the Record timely filed Constitutionally based exceptions to and appeal from the Special Masters Report (Appendix p. 30).

AND

(c) Without Notice or Hearing striking and exponging from the Record those parts of Petitioner's (condemnees) answer which sought to raise those same Constitutional Rights for consideration at the Trial (Appendix p. 37).

AND

(d) Withholding the Record of the Trial in order to prevent the Hearing and Consideration of Condemnee's Motion, filed September 28, 1972 (THE RECORD OF THIS TRIAL HAS NOT YET BEEN FURNISHED PETITIONER).

In spite of these actions by the Respondent and the Superior Court of Burke County, Georgia, the United States District Court for the Southern District of Georgia granted summary Judgment for Respondent, Georgia Power Company (Appendix p. 3 - 22) and the United States Court of Appeals for the Fifth Circuit affirmed without opinion and by reference only to the opinion on the District Court (Appendix p. 1 - 2).

STATUTES, FEDERAL RULES, AND REGULATIONS INVOLVED

TITLE 28 U.S.C. 1331

TITLE 28 U.S.C. 1343(3)

TITLE 28 U.S.C. 1343(4)

TITLE 42 U.S.C. 1983

FIFTH AND FOURTEENTH AMENDMENTS TO THE CONSTITUTION OF THE UNITED STATES

STATEMENT

Petitioner owned land in Burke County Georgia. The Georgia Power Company, a public utility, after ext ended studies decided it wished to construct on Petitioner's land a plant to manufacture electricity. It therefore commenced an action to condemn fee simple title to said land. (Appeendix pp. 39 - 55).

This action was taken under Chapter 36-8 Condemnation, etc. by Power Companies, Section 36-801 of the Georgia Code Annotated which section only grants the right to condemn "rights-of-way or other easements over the lands of others in order to run lines of wires, maintain dams, flow backwater or for other uses necessary to said purposes." and

this right to condemn rights-of-way or easements is granted only to "any corporation or individual owning or controlling any water power or location for a steam plant. . ." (Appendix pp. 25 - 26). The Supreme Court of Georgia has strictly limited the power to condemn necessary easements.

222 Georgia 830, 381 152 S. E. (2d) 841. Ben W. Hand Farm, Inc. v. The Georgia Power Co.

ON AUGUST 11, 1971, the Condemnation Petition was filed (Appendix Page 55).

ON AUGUST 11, 1971 (before service on S. K. Brown, Petitioner), an order was entered appointing a Special Master and setting a Hearing before that Special Master for August 24, 1971 (Appendix pages 56 - 60).

ON AUGUST 12, 1971, the Condemnation Petition and Order were served on S. K. Brown (Condemnne) (Appendix page 65).

ON AUGUST 16, 1971, S. K. Brown employed counsel to represent him and the court granted his cousel Glenn P. Hester FIVE

(5) additional days to prepare for the Hearing (Appendix page 67).

ON AUGUST 31, 1971, the Hearing was held.

ON SEPTEMBER 2, 1971, the Special Master filed his Report (Appendix pages 68 - 74).

ON SEPTEMBER 2, 1971, IN KEEPING WITH ITS HASTY DISREGARD FOR PETITIONERS (condemnee's) RIGHTS, IN THE FACE OF THE LIMITING STATUTE REFERRED TO ABOVE AND WITHOUT NOTICE TO THE PETITIONER OR HEARING ON THE MATTER, THE RESPONDENT SECURED AN ORDER FROM THE SUPERIOR COURT OF BURKE COUNTY, Georgia condemning fee simple title to petitioner'S LAND. AS APPEARS HERE, THIS ORDER WAS SIGNED ON THE SAME DAY THE SPECIAL MASTER MADE HIS REPORT (Appendix pp. 75 - 80) AND IN THE FACE OF A STATUTE GIVING PETITIONER TEN (10) DAYS TO FILE EXCEPTIONS AND APPEAL FROM THE REPORT OF THE SPECIAL MASTER. (Appendix p. 23)

ON SEPTEMBER 10, 1971, within the ten

day period, Petitioner filed in the Superior Court of Burke County, Georgia his exceptions and appeal setting forth the fact that the Respondent had violated his Constitutional Rights and had condemned fee simple title to his land. (Appendix pp. 24 - 27)

ON APRIL 24, 1972, without ever hearing the appeal and without notice to Petitioner or Hearing, the Superior Court of Burke County, Georgia ordered his exceptions and his appeal stricken and exponged from the record. (Appendix p. 30)

ON SEPTEMBER 10, 1971, Petitioner filed his Answer raising the same Constitutional questions and defenses. (Appendix pp. 33 - 36)

ON APRIL 19, 1972, the Superior Court of Burke County, Georgia, without notice to Petitioner or Hearing, ordered all those references to Constitutional questions and to defenses based thereon stricken and exponged from the record (Appendix pp. 37 - 38)

Thereafter, at the Trial the Court refused to allow any reference to or evidence or ar-

gument about the Constitutional questions of the Respondent's right to condemn (Appendix p. 32).

Petitioner made a Motion for a new trial on the 28th day of September, 1972, (Appendix pp. 81 - 82) and since that time has been unable to get the Record in order to hear the Motion.

When it became apparent to Petitioner that Respondent and the Superior Court of Burke County, Georgia were, under color of Georgia Law as set out above unlawfully depriving him of rights guaranteed to him under the Constitution and laws of the United State be on January 30, 1973, commenced this action in the United States District Court for the Southern District of Georgia in order to protect those rights.

The Respondent filed a Motion for Summary Judgment based upon the allegations that the matter was res-judicada because of the action of the Superior Court of Burke County, Georgia and because the Petitioner withdrew the original deposit placed with the Court after his land had been unlawfully taken from him and placed in the possession of Respondent(Petitioner has never

accepted the Judgment of the Superior Court of Burke County, Georgia and never withdrawn the additional funds granted to him by that jury).

The United States District Court for the Southern District of Georgia granted Respondent's Motion for Summary Judgment (Appendix p. 3 - 22) and Respondent appealed to the United States Court of Appeals for the Fifth Circuit. That Court affirmed the decision of the District Court without allowing argument and without any opinion save a reference to the opinion of the District Court (Appendix p. 1 and 2).

The opinion of the District Court was based largely upon the doctrine of Res-judicada and in support of that theory the Court said in referring to the Judgment of the Superior Court of Burke County, Georgia, "There was no appeal from this Judgment to the Appellate Courts of Georgia."

THIS STATEMENT WAS MADE BY THE UNITED STATES DISTRICT COURT IN THE FACE OF THE FACT THAT IN PARAGRAPH 3 OF RESPONDENT'S SIXTH DEFENSE, RESPONDENT, GEORGIA POWER COMPANY

SAYS: "PLAINTIFF HAS PENDING IN THE SUPERIOR COURT OF BURKE COUNTY, A MOTION FOR A NEW TRIAL AND THEREAFTER HAS THE RIGHT UNDER GEORGIA LAW TO APPEAL ALL ISSUES HERETOFORE DECIDED ADVERSE TO HIM."

The above statement, by the Respondent, shows that the major basis for the opinion of the District Court was erroneous as there was then pending a Motion for a new trial in the Superior Court of Burke County, Georgia, which Motion was made in order to make possible an appeal from the State Court Trial. This is the Motion that has not yet been heard because since September 30, 1972, Petitioner has been attempting to secure a record of their trial in order to have a hearing on the Motion. That record is still being withheld by the Superior Court of Burke County, Georgia -- so the Motion cannot be heard and appeals cannot be entered or perfected.

The District Court Judgment goes on to say: "A careful analysis of the State Court Record fails to reveal any consideration during the state preceedings of the issue as to defendant's power under Code Annotated, Chapter 36-6A to condemn plaintiff's property in fee simple. Such

failure, however, cannot prevent operation of the doctrine of res-judicada in regard to that issue. The Judgment is conclusive, not only as to matters which were decided, but also as to all matters which might have been decided (Appendix pp. 3 - 22).

HOW COULD PETITIONER HAVE GOTTEN A DECISION ON THE CONSTITUTIONAL QUESTIONS WHEN EVERY TIMELY ATTEMPT TO DO SO WAS STRICKEN AND ESPONGED FROM THE RECORD BY THE SUPERIOR COURT OF BURKE COUNTY, GEORGIA AND HE WAS FORCED TO THE TRIAL ON THE ISSUE OF DAMAGES ONLY?

Where can Petitioner go? What can he do? A Georgia Court, by striking from the record all reference to the real issues arising under the Constitution of the United States prevents their consideration in the State Trial and by withholding the record halts the appellate process.

A District Court of the United States says that regardless of this high handed and unconstitutional action, the whole matter is res-judicada and petitioner has not appealed when the Motion, making possible the appeal, is still

pending and when the Respondent has so stated in his pleadings. Inspite of this fact, the District Court granted Summary Judgment and the action was upheld without argument or opinion by the United States Court of Appeals for the Fifth Circuit.

Meanwhile, as a Billion Dollar installation is being constructed on lands wrongfully taken from Petitioner under color of Georgia Law and in violation of the Constitution of the United States, Petitioner is forced to stand outside and the doors of the Courts of the United States have thus far been closed to his pleas for justice.

REASONS FOR GRANTING THE WRIT

The opinion of the United States District Court for the Southern District of Georgia and the opinion of the United States Court of Appeals for the Fifth Circuit adopting that opinion are contrary to the opinions of this Court in numbers of cases and, if allowed to stand, will make impossible the effective enforcement of the Civil Rights Statutes.

The only basis for the opinions in this case, as expressed therein, is that because the matter was heard in the State Court it is res-judicada.

If the doctrine of res-judicada is allowed to control the Federal enforcement of the Civil Rights Law, then everyone whose Civil Rights have been denied under color of State Law will be unable to get any redress or any protection in the Courts of the United States and the enforcement of the Civil Rights Laws will be effectively blocked.

The opinion in this case is contrary to the rule that Federal Courts must exercise their jurisdiction without regard to proceedings in State Courts when Civil Rights are involved. This doctrine was strongly set forth in the case of County of Allegheny, v. Frank Mashuda Company, 360 U.S. 185, 3 L.Ed. (2d) 1163, 79 Sup Ct. 1060, involving a condemnation of land and questions as to the validity of a State Condemnation proceeding. The Supreme Court in this case specifically held that the refusal of the District Court to hear the matter was error. In that decision, Mr. Justice Brennon pointed out on Page 1168 of the L.Ed. that the Federal Courts have been adjudicating State Civil Rights cases since 1878, and in discussing its authority to adjudicate State Condemnation matters, said on Page 1169, "This rational was subsequently applied by this Court to uphold adjudication of state eminent domain proceedings

involving suits between diverse parties in the Federal Courts even though the procedures available would not be the same as those provided by the state practices. . . and even though the case involved the power of the condemning authority to take the property." The opinion in this case is also contrary to the rule laid down in the case of Mitchum, v. Foster 407, U.S. 225, 32 L. Ed(2d) 705, 92 Sup. Ct. 2151, (1971), which held that the Civil Rights Act empowered the Federal Court to enjoin actions in the State Court.

The opinion in this case is also contrary to the rule that Petitioner's property rights are subject to protection under the Civil Rights Laws. This rule is clearly stated in Lynch, v. Household Finance Corporation, 405 U.S. 538, 31 L. Ed.(2d) 424, 92 Sup. Ct. 1113, Justice Stewart speaking for the Court on Page 429 of the L. Ed. says:

> "This Court has never adopted the distinction between personal liberties and property rights as a guide to the contours of 1343 (3) Jurisdiction. Today we expressly reject that distinction. Neither the words of 1343 (3) nor the legislative history of that provision distinguishes between personal and property

rights. In fact, the Congress that enacted the predecessor of 1983 and 1343 (3) seems clearly to have intended to provide a Federal Judicial form for the redress of wrongful deprivation of property by persons acting under color of State Law."

Surely all these statutes and decisions giving the Federal Courts power to hear and determine Civil Rights matters cannot be brought to nought by the doctrine of res-judicada. The judgments in this case also were based on the fact that the Judgment in the Superior Court of Georgia was final. Whether it was a final Judgment or not, the Civil Rights Act may still be enforced in the Courts of the United States as set forth in the preceeding paragraphs.

However, the statement in the United States District Court opinion that a final Judgment had been entered was clearly error as that Judgment was being attacked by a Motion for a new trial after which the appellate process could begin.

That this was not a final Judgment is clearly shown by the decisions of other circuits and the decisions of the Courts of Georgia.

In Automotive Sales Corporation, v. Stayton, 45 Federal (2d) 476, the Eighth Circuit decided that the law of the state where the Judgment was rendered controlled on the question of whether or not it could be pleaded as res-judicada. The law of Georgia as expressed in New Amsterdam Casualty Company, v. Russell, 103 Ga. App. 553, 120 S.E. (2d) 150, is to the effect that a Judgment is not a final Judgment until the appellate process is concluded and the result has been certified to the Trial Court.

If this Judgment of the Fifth Circuit is allowed to stand, it will place serious impediments on the enforcement of the Civil Rights Law and greatly confuse all persons seeking to enforce those laws. The number of cases which have held that State Judicial remedies need not be exhausted before bringing Civil Rights actions and all the other cases fortifying the rights of litigants to come into the Federal Courts for protection of their Constitutional Rights will

be seriously weakened.

It is respectfully submitted that this case and decision should not be allowed to stand.

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